A

Cheah Boon Hoe v Lee Choon Hei

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-127–01 OF 2020
MOHAMAD ZABIDIN, VAZEER ALAM AND MOHD SOFIAN JJCA
16 APRIL 2021

C

Civil Procedure — Appeal — Appeal against decision of High Court — Whether trial judge erred in granting order for indemnity — Whether merits of case heard during earlier third party proceeding — Whether res judicata applicable — Whether appellate intervention warranted

D

Civil Procedure — Res judicata — Earlier proceedings — Whether merits of case heard during earlier third party proceeding — Whether res judicata applicable

E

This was an appeal against the High Court's decision which allowed the respondent's claims for the indemnity against the appellant. The respondent was the branch partner of the law firm Messrs Paul Cheah & Associate ('the firm') in Port Klang from 14 July 2006 to 30 June 2008. The appellant was also a partner in the firm. Both the respondent and the appellant had entered into a branch partnership agreement dated 14 July 2006 ('the agreement'). The respondent had withdrawn his partnership with the firm on 30 June 2008 after giving due notice to the appellant as a principal owner of the firm and also to the Malaysian Bar Council secretariat. However, without the knowledge of the respondent, on 25 January 2011, Public Bank Bhd ('the bank') sued the firm ('Suit No 165') for loss and damages arising from a fraudulent and or negligent act by a partner in the firm's Kuala Lumpur branch ('KL branch'). The bank subsequently obtained judgment against the firm for the sum of RM561,413.02 with interests and costs of RM180,000 ('the judgment sum'). The respondent was not notified, nor added, nor served with cause papers or even called as a witness to the Suit No 165. The respondent was not aware of Suit No 165 nor the judgment taken in that suit until sometime in late 2014 when the bank took out an application seeking leave to enforce the judgment sum against each of the partners of the firm and thereafter to commence bankruptcy proceedings against all the former partners of the firm accordingly. The respondent then initiated third party proceedings against the appellant in Suit No 165 ('third party proceeding'), seeking a claim in indemnity from the appellant for the Suit No 165 judgment sum. By an order dated 11 November 2015, the learned High Court judge dismissed the application for third party directions and terminated the third party proceeding pursuant to O 16

F

G

H

I

r 4(3)(c) of the Rules of Court 2012. The respondent then filed the suit ('Suit No 258') against the appellant. The respondent sought full indemnity from the appellant, as the principal owner and partner of the firm, pursuant to cl 19.1 of the agreement, against the full judgment sums in the Suit No 165 and all costs awarded against respondent including all costs and expenses, disbursements and legal fees suffered by respondent. The remaining partners of the firm had passed away while the KL branch partner was an undischarged bankrupt. On 27 December 2019, the learned judicial commissioner ('JC') found that the respondent had succeeded in his claim and allowed the respondent's prayers. Dissatisfied with the decision, the appellant filed this appeal. The issues in this appeal were: (a) whether the merits of the case had been heard during the third party proceeding; and (b) whether the doctrine of res judicata was applicable.

Held, allowing the appeal with costs:

(1) The court observed that although the learned JC made a finding that the appellant was the principal owner of the firm and was liable to indemnify the respondent, however the order of the learned JC was to terminate the third party proceeding filed in Suit No 165 after perusing the affidavits, written submissions and hearing the oral submission, on the ground of procedural irregularities. The court further held the view that the learned JC had heard arguments on the issue of indemnity against the appellant on its merits and ruled that the appellant was liable to indemnify the respondent. The prayers in the third party proceeding and in Suit No 285 were similar, ie that the appellant was liable to indemnify the respondent for the Suit No 165 judgment (see paras 42–43).

(2) In order for the doctrine of res judicata to apply, the respondent had to prove that the same issue had been raised and decided in an earlier proceeding/action in which the parties were represented. The court was constrained to disagree with the decision of the learned JC that the merit of the case was never argued. It was patently clear that in the ground of judgment, the learned JC had touched on the issue of indemnity and found that the appellant was liable to indemnify the respondent. These were the very same issues raised in the third party proceeding that was earlier dismissed. Hence, the doctrine of res judicata was applicable (see paras 44 & 48).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden untuk ganti rugi terhadap perayu. Responden adalah rakan kongsi cawangan firma guaman Tetuan Paul Cheah & Associate ('firma') di Pelabuhan Klang dari 14 Julai 2006 hingga 30 Jun 2008. Perayu juga merupakan rakan kongsi dalam firma itu. Kedua-dua responden dan perayu telah memeterai perjanjian perkongsian cawangan bertarikh 14 Julai 2006 ('perjanjian'). Responden telah menarik balik perkongsiannya dengan firma

tersebut pada 30 Jun 2008 selepas memberi notis kepada perayu sebagai pemilik tunggal firma tersebut dan kepada sekretariat Majlis Peguam Malaysia. Walau bagaimanapun, tanpa pengetahuan responden, pada 25 Januari 2011, Public Bank Bhd ('bank') menyaman firma tersebut ('Guaman No 165') untuk kerugian akibat tindakan penipuan dan atau kecuaian oleh rakan kongsi di cawangan Kuala Lumpur firma tersebut ('cawangan KL'). Bank tersebut kemudiannya memasukkan penghakiman terhadap firma tersebut atas jumlah RM561,413.02 dengan faedah dan kos sebanyak RM180,000 ('jumlah penghakiman'). Responden tidak dimaklumkan atau diserahkan kertas kausa, malah tidak dipanggil sebagai saksi di dalam Guaman No 165. Responden tidak menyedari wujudnya Guaman No 165 atau penghakiman yang dimasukkan dalam guaman tersebut sehingga akhir 2014 apabila bank tersebut mengeluarkan permohonan meminta kebenaran untuk menguatkuasakan jumlah penghakiman terhadap setiap rakan kongsi firma dan prosiding kebankrapan telah dimulakan terhadap semua bekas rakan kongsi firma tersebut. Responden kemudian memulakan prosiding pihak ketiga terhadap perayu di dalam Guaman No 165 ('prosiding pihak ketiga'), memohon tuntutan ganti rugi daripada perayu untuk jumlah penghakiman Guaman No 165. Melalui perintah bertarikh 11 November 2015, hakim Mahkamah Tinggi menolak permohonan pihak ketiga dan membatalkan prosiding pihak ketiga menurut A 16 k 4(3)(c) Kaedah-Kaedah Mahkamah 2012. Responden kemudian memfailkan guaman tersebut ('Suit No 258') terhadap perayu. Responden memohon ganti rugi penuh daripada perayu, sebagai pemilik utama dan rakan kongsi firma, menurut klausa 19.1 perjanjian tersebut, terhadap jumlah penghakiman penuh di dalam Guaman No 165 dan semua kos yang diberikan terhadap responden termasuk semua kos dan yuran guaman yang dibayar oleh responden. Rakan kongsi firma yang lain telah meninggal dunia manakala rakan kongsi cawangan KL merupakan seorang bankrap yang belum dilepaskan. Pada 27 Disember 2019, pesuruhjaya kehakiman ('PK') memutuskan bahawa responden telah berjaya di dalam tuntutannya dan membenarkan permohonan responden. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu-isu dalam rayuan ini adalah: (a) sama ada merit kes itu telah didengar semasa prosiding pihak ketiga; dan (b) sama ada doktrin res judicata boleh digunakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah mendapati bahawa walaupun PK yang terpelajar membuat dapatan bahawa perayu adalah pemilik tunggal firma tersebut dan bertanggungjawab untuk menanggung rugi responden, namun perintah PK yang terpelajar adalah untuk membatalkan prosiding pihak ketiga yang difailkan dalam Guaman No 165 setelah meneliti afidavit, penghujahan bertulis dan mendengar penghujahan lisan, atas alasan kesalahan prosedur. Mahkamah ini selanjutnya berpendapat bahawa PK yang terpelajar telah mendengar hujah-hujah mengenai isu ganti rugi

terhadap perayu berdasarkan meritnya dan memutuskan bahawa perayu bertanggungjawab untuk menanggung rugi responden. Perkara yang dipohon di dalam prosiding pihak ketiga dan di dalam Guaman No 285 adalah sama, iaitu perayu membayar ganti rugi responden untuk penghakiman Guaman No 165 (lihat perenggan 42–43).

(2) Untuk mengguna pakai doktrin res judicata, responden perlu membuktikan bahawa isu yang sama telah dibangkitkan dan diputuskan dalam prosiding/tindakan yang lebih awal di antara pihak-pihak. Mahkamah ini tidak bersetuju dengan keputusan PK terpelajar bahawa merit kes tersebut tidak pernah dibangkitkan. Adalah jelas di dalam alasan penghakimannya, PK yang terpelajar telah menyentuh isu ganti rugi dan mendapati bahawa perayu bertanggungjawab untuk menanggung rugi responden. Ini adalah isu yang sama yang dibangkitkan dalam prosiding pihak ketiga yang sebelum ini dibatalkan. Oleh itu, doktrin res judicata boleh diguna pakai di dalam kes ini (lihat perenggan 44 & 48).]

Cases referred to

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119; [1993] 4 CLJ 332, SC (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Satyadhyan Ghosal and others v SM Deorajin Debi and another 1960 AIR 941, SC (refd)

Legislation referred to

Insolvency Act 1967 s 38(1)(a)
Partnership Act 1961 ss 20, 43
Rules of Court 2012 O 16 r 4(3), 4(3)(c), O 77 r 5(4)

Appeal from: Civil Application No WA-22NCC-258–05 of 2019 (High Court, Kuala Lumpur)

Robert Low (with Esther Hor Su Ying and Karen Yong Hwei Woon) (Paul Cheah Assoc) for the appellant.
Ling Young Tuen (Lee Ling & Partners) for the respondent.

Mohd Sofian JCA:

INTRODUCTION

[1] This is the appellant/defendant's appeal against the decision of the High Court after a full trial in allowing the respondent/plaintiff's claim as per prayer (1)(a), (b) and (c), prayer (ii) of para 15 of the statement of claim with costs of RM25,000 subject to allocator.

[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

[3] Having considered the appeal records and the submissions of the parties in the appeal, it is our unanimous decision that the appeal is allowed with costs. We now give our reasons for the same.

BACKGROUND FACTS

[4] The plaintiff was the branch partner of the law firm Messrs Paul Cheah & Associate ('the firm') located at Port Klang from 14 July 2006 to 30 June 2008 ('Port Klang branch'). The defendant, was also a partner in the firm. Both plaintiff and defendant had entered into a branch partnership agreement dated 14 July 2006 ('the agreement').

[5] Under cl 19.1 of the agreement, it is stated that 'The Law Firm/Principal Owner shall at all material times indemnify the Branch Partner against all losses, damages, actions, negligence suit or any form of legal proceedings taken against the Partnership in respect of or any action arising from the Kuala Lumpur, Subang Jaya, and Klang branches whether by its staff or legal assistants (if any)'.

[6] The plaintiff has withdrawn his partnership with the firm on 30 June 2008 after giving due notice to the defendant as a principal owner of the firm and also to the Malaysian Bar Council secretariat.

[7] However, without the knowledge of the plaintiff, on 25 January 2011, Public Bank Bhd ('the bank') sued the firm at the Kuala Lumpur High Court in Civil Suit No D-22NCC-165 of 2011 ('Suit No 165) for loss and damages arising from a fraudulent and or negligent act by one Frankie Tan Lyn Seang ('Mr Frankie Tan'), a partner in the firm's Kuala Lumpur branch ('KL branch'). The bank subsequently obtained judgment against the firm for the sum of RM561,413.02 with interests and costs of RM180,000 ('the judgment sum'). The plaintiff was not notified, nor added, nor served with cause papers or even called as a witness to the Suit No 165.

A **[8]** The plaintiff was not aware of Suit No 165 nor the judgment taken in that suit until sometime in late 2014 when the bank took out an application seeking leave to enforce the judgment sum against each of the partners of the firm and thereafter to commence bankruptcy proceedings against all the former partners of the firm accordingly.

B

[9] Post the Suit No 165 judgment, by a notice of application dated 24 October 2014, Public Bank Bhd applied for leave to issue execution against the partners of the firm, including the respondent, under O 77 r 5(4) of the Rules of Court 2012. It obtained leave on 26 August 2015. Public Bank Bhd did not seek to issue execution against the defendant and under the leave order dated 26 August 2015 also did not expressly include the defendant as one of the partners against whom execution was to be levied.

C

D **[10]** An act of bankruptcy was ordered by the senior assistant registrar against the plaintiff with costs of RM2,000. The plaintiff's appeal against the senior assistant registrar's decision was dismissed with costs of RM3,000 on 8 April 2019. As a result, the plaintiff unsuccessfully opposed the enforcement applications at the High Court, Court of Appeal and Federal Court and

E suffered costs and expenses incidental thereto.

[11] The plaintiff then initiated third party proceeding against the defendant in Suit No 165 ('third party proceeding'). In the statement of claim filed for the third party proceeding, the plaintiff was in effect seeking a claim in

F indemnity from the defendant for the Suit No 165 judgment sum. This claim was premised upon the branch partnership in the same agreement.

[12] By an order dated 11 November 2015, the learned High Court judge

G dismissed the application for third party directions and terminated the third party proceeding ('dismissal/termination order'). This dismissal/termination order was made pursuant to O 16 r 4(3)(c) of the Rules of Court 2012 given the utilisation of the words/phraseology. No grounds of judgment were furnished in respect of the dismissal/termination order. The plaintiff also did not appeal

H against the dismissal/termination order.

[13] The plaintiff then filed the Civil Suit No WA-22NCC-258–05 of 2019 ('Suit No 258'). The plaintiff seeks full indemnity from the defendant, as the principal owner and partner of the firm, pursuant to the said cl 19.1 of the

I agreement, against the full judgment sums in the Suit No 165 and all costs awarded against plaintiff including all costs and expenses, disbursements and legal fees suffered by plaintiff. The remaining partners of the firm who are Venu Nair and Sulaiman bin Mohd Said have passed away while Mr Frankie Tan is now an undischarged bankrupt.

[14] Plaintiff, in para 15 of the statement of claim prayed as follows:

15. And the Plaintiff claim against the Defendant as follows:-

(i) An Order that the Defendant to indemnify and keep the Plaintiff fully indemnified against the full Judgment Sums and costs in Kuala Lumpur Suit No. D-22NCVC-165-2011 as follows:-

(a) RM1,000,896.16 and still running at 9.8% per annum or any variation calculated by Public Bank Berhad and running;

(b) All costs awarded against Plaintiff in High Court, Court of Appeal and Federal Court per paragraph 7.4 above; and

(c) All costs and legal fees and disbursement paid out-of-pocket suffered by Plaintiff arising out of the Civil Suit No. D-22NCVC-165-2011 including the bankruptcy proceedings at the Kuala Lumpur High Court WA-29NCC-3266-11/2018 by Public Bank Berhad on 15/11/2018 and continuing action.

(ii) Judgment to be entered against Defendant in the sums in paragraph 15(i)(a), (b) & (c) above with interest at 5% per annum,

(iii) Alternatively, for the contribution of such sum or amount as the court deem fit and proper.

(iv) Damages for collusion and/or breach of duties (to be assessed).

(v) Cost on solicitors-client.

(vi) Such other reliefs as the Honourable Court deem fit and proper.

[15] There was controversy as to when the defendant ceased to be a partner of the firm and also the issue of res judicata.

THE PLAINTIFF'S CASE

[16] The plaintiff in his submission had argued the followings:

(a) the plaintiff maintained that his relationship with the defendant had continued to be governed by the terms of the agreement throughout the period from the time he signed the agreement on 14 July 2006 until his resignation on 30 June 2008;

(b) the defendant had continued to be entitled to 50% of the profit of the Port Klang branch even after 1 August 2006 when the defendant had purportedly become a consultant of the firm. In fact, the defendant himself did not dispute that he had continued to draw the monthly sum of RM2,000 as provided in the Appendix to the agreement;

(c) the plaintiff maintained that neither the defendant nor the firm had ever informed him of the defendant's resignation as the senior partner of the firm and assuming the role as a consultant as at 1 August 2006; and

(d) as regards to the third-party action, it is the plaintiff's case that the merits of his third-party action against the defendant was never considered and determined by the High Court when the same was dismissed. As such, the doctrine of res judicata simply does not apply.

THE DEFENDANT'S CASE

[17] On the other hand, the defendant submitted as follows:

(a) the court has to determine as a matter of fact and law whether the defendant was a partner of the firm during the period when the plaintiff was the branch partner on the following basis:

(i) according to the defendant, as at 1 August 2006 he had resigned as the senior partner of the firm and took on the position as a consultant instead. The defendant referred to his letter to the Bar Council dated 26 June 2006 as proof of his assertion;

(ii) the defendant also referred to the firm's accountant's report for the year ended 31 December 2006 dated 7 December 2007 ('the 2006 Accountant Report') and 31 December 2007 dated 26 December 2008 ('the 2007 Accountant Report'). In particular, in the 2006 Accountant Report, there is a notation next to the defendant's name stating that he had resigned on 1 August 2006. As for the 2007 Accountant Report, the defendant's name no longer appeared in the particulars of solicitors of the firm; and

(iii) the defendant also gave oral testimony that the plaintiff was fully aware of the fact of his 'retirement and resignation' and his new role as 'consultant' of the firm.

(b) on the issue of res judicata, the defendant referred to the plaintiff's third party proceeding that was filed against him by the plaintiff in the Suit No 165 whereby in the Suit No 258, the plaintiff had raised an identical/similar cause of action as that pleaded and contained in the third party proceeding. The third party proceeding was dismissed by the High Court on 11 November 2015 and there was no appeal by the plaintiff against the dismissal. On this ground, the defendant says that the plaintiff's present action is no longer sustainable by reason of the doctrine of res judicata;

(c) the defendant also submitted that the plaintiff's claim for indemnity is pre-mature as the plaintiff has yet to make any payment of the judgment sum to the bank; and

(d) the defendant thereafter filed further submission seeking for the action to be dismissed based on the plaintiff's bankruptcy in which the plaintiff as

bankrupt failed to apply for sanction from the Director General of Insolvency to permit the plaintiff to continue with the action pursuant to s 38(1)(a) of the Insolvency Act 1967.

DECISION OF THE HIGH COURT

[18] On 27 December 2019, at the conclusion of the trial, the learned judicial commissioner ('learned JC') found that the plaintiff had succeeded in his claim and allowed the plaintiff's prayers.

[19] The learned JC was of the view that:

(a) the defendant has not been able to adduce any evidence before the court that his relationship with the plaintiff during the period from 14 July 2006 to 30 June 2008 was no longer regulated by the terms of the agreement. In fact, the defendant admitted during cross examination that the agreement was not varied or amended at all after he assumed the role as consultant to the firm on 1 August 2006;

(b) it is pertinent to note that the defendant was identified as the 'principal owner' of the firm under cl 6.1(b) of the agreement and he was entitled to 50% of the profits and losses of the Port Klang Branch;

(c) further, under cll 7 and 13 of the partnership agreement, it is clear that the defendant played a significant role in the financial and management matters of the Port Klang branch as well. These roles continued to be exercised by the defendant notwithstanding his 'resignation' as senior partner of the firm and assuming the designation as 'consultant' to the firm since the agreement was never varied or amended. This is acknowledged by the defendant when he confirmed that he continued to received RM2,000 a month because the parties had agreed to the same under the agreement;

(d) the plaintiff was in fact not told throughout the period when he was the branch partner of the firm that the defendant has resigned as senior partner of the firm. The letter dated 26 June 2006 that was issued by the defendant to the Bar Council was never copied to the plaintiff;

(e) there is also no evidence that the 2006 Accountant Report and the 2007 Accountant Report were ever furnished to the plaintiff whilst he was the Branch Partner of the Port Klang branch;

(f) in fact, there is evidence that suggests that the defendant's designation as 'consultant' of the firm was more form than substance;

(g) the plaintiff had discharged his burden when he established that the terms of the agreement had continued to govern his relationship with the

defendant. The evidential burden then shifts to the defendant to show that his position in the firm had indeed changed;

(h) the issue of the existence of a partnership is not to be decided merely by what the parties called each other or by the manner in which the party labelled his position. Whether a person is to be treated in law as a partner depends on an examination of the real substance of his relationship with others. Where the necessary elements of a partnership exist in fact, a relationship will be construed as a partnership in law even though the parties may say no;

(i) in the present case, the defendant was indeed a partner of the firm notwithstanding his letter to the Bar Council on 26 June 2006 notifying his retirement as senior partner and his re-designation of his role as consultant to the firm. In every aspect, the defendant's position as the principal owner had not changed. Accordingly, the defendant is liable to indemnify the plaintiff for the judgment sum;

(j) on the issue of res judicata, the burden is on the defendant to show that the High Court had in the 165 Suit determined the plaintiff's third party proceeding on its merits. No evidence has been placed before the court that this was the case. A perusal of the written submissions of counsel for the defendant in respect of the third party proceeding shows that a good part of the same had dealt with procedural irregularities in the third party proceeding. The minutes of the learned judge who dismissed the third party proceeding was not produced before the High Court;

(k) however, based on the order dated 11 November 2015 it is apparent that the third party proceeding filed by the plaintiff in Suit No 165 was terminated pursuant to O 16 r 4(3) of the Rules of Court 2012 following the court's order setting aside the plaintiff's notice for third party directions dated 20 January 2015. This suggests that the merits of the plaintiff's third party proceeding were never considered and determined by the High Court at all;

(l) on the question as to whether the plaintiff's claim is premature as he has not made any payment of the judgment sum to the bank, the learned HCJ refer to the Supreme Court case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 where it was held that for an indemnity claim, the cause of action should begin to run from the date the defendant is held liable; and

(m) finally, on the issue of the plaintiff's bankruptcy, the plaintiff has on 23 December 2019 obtained an order staying the adjudication order and receiving order dated 9 December 2019 until 27 December 2019 which is the date fixed for further submission and decision by this High Court. Given that the bankruptcy order has been stayed, the defendant's objection to the action is no longer valid.

[20] Dissatisfied with the decision, the defendant filed this appeal.

THE APPEAL

[21] This appeal is premised on the following grounds as stated in the memorandum of appeal namely:

(a) the learned JC erred in law and/or in fact in granting the order that the defendant to indemnify and keep the plaintiff fully indemnified against the full judgment sum and costs in Suit No 165;

(b) the learned JC erred in law and/or in fact in holding that res judicata did not apply and that the merits of the third party proceeding were never considered and determined by the High Court at all;

(c) the learned JC erred in law and/or in fact in holding that the defendant was indeed a partner of the firm and his designation as a consultant of the firm was more form than substance;

(d) the learned JC erred in law and/or in fact in holding that cl 19.1 of the agreement dated 14 July 2006 between the firm and the plaintiff applied. The learned JC failed to consider and/or appreciate and/or give sufficient consideration to the fact that the only parties to the branch partnership agreement were the firm and the plaintiff. The defendant was not a party to the agreement;

(e) the learned JC erred in law and/or in fact in not holding that the plaintiff's claim is premature;

(f) the learned JC erred in law and/or in fact in ordering the quantum of relief. In this regard, the learned JC failed to consider and/or appreciate and/or give sufficient consideration that the plaintiff had not exercised prudence and/or had failed to mitigate his losses and damage (if any);

(g) the learned JC erred in law and/or in fact in not dismissing the defendant's claim in the court below with costs to be paid by the plaintiff to the defendant; and

(h) the learned JC erred in law and/or in fact in failing to consider and/or appreciate and/or give sufficient consideration to the defendant's submissions in the court below.

Submissions

[22] At the outset of the hearing, the learned counsel for the defendant informed the court that he would be relying on only one issue in this appeal namely the issue of res judicata whether it is applicable.

[23] The learned JC held that res judicata did not apply and that the merits

of the third party proceeding were never considered and determined by the High Court at all.

[24] The learned counsel for the defendant submitted that if res judicata is applicable then the issue would have been conclusively decided by reason of the order dated 11 November 2015 in the third party proceeding.

[25] It is pertinent to note that the learned JC on the issue of res judicata held that the defendant had the burden to show the High Court had in the Civil Suit No D-22NCC-165 of 2011 (Suit 165) determined the plaintiff's third party proceedings on its merits. The learned JC held that no evidence has been placed before the court that this was the case.

[26] Pursuant to the judgment obtained, by a notice of application dated 24 October 2014, the bank applied for leave to issue execution against the partners of the firm, including the plaintiff, under O 77 r 5(4) of the Rules of Court 2012. It obtained leave on 26 August 2015. The bank however did not seek to issue execution against the defendant. The leave order dated 26 August 2015 also did not expressly include the defendant as one of the partners against whom execution was to be levied.

[27] The plaintiff then initiated a third party proceeding against the defendant by way of third party notice before the High Court via encl 92 dated 20 January 2015 for indemnity from the defendant arising from judgment obtained in Suit 165. The third party proceeding was opposed by the defendant. On 27 January 2015, the defendant entered an appearance for the third party proceedings.

[28] This court has had sight of the relevant cause papers with regard to the third party proceeding filed at the High Court in Suit 165. Among the issues raised by the defendant are that the third party claim is defective, no prima facie case, inordinate delay, alleged indemnity under branch partnership agreement.

[29] The third party proceeding is brought in reliance of cl 19.1 of the branch partnership agreement dated 14 July 2006. The partnership agreement was executed by the defendant on behalf of the firm as a managing partner at that material time.

[30] It was argued by the defendant in the third party proceeding that pursuant to s 20 of the Partnership Act 1961 since the defendant had retired as a partner from the firm as at 1 August 2006, the agreement could not bind or be enforceable against the defendant. For ease of reference s 20 of the Partnership Act, is reproduced herewith:

A continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which or of the firm in respect of the transactions of which, the guarantee was given.

[31] It was submitted by the plaintiff in his written submission in the third party proceeding that the plaintiff is entitled to indemnity for any losses or damages in view of cl 19(1) of the branch partnership agreement and also to be indemnified as provided under s 43 of the Partnership Act in the event of any fraud or misrepresentation by the appellant as partner of the firm.

[32] The plaintiff submits that the order of the High Court dated 11 November 2015 dismissing the third party directions application and terminated the third party proceeding was made pursuant to O 16 r 4(3)(c) of the Rules of Court 2012 on the ground that the third party proceeding was irregular and /or premature as neither the writ of summons nor the pleadings of the main suit was served on the defendant. The defendant was only served with the notice of application and the merits of the case was not heard.

[33] Before us, the learned counsel for the plaintiff canvassed the same argument that in the third party proceeding the merits of the case was not heard. Hence there is no res judicata.

[34] The learned counsel for the defendant submitted that the objects of third party proceeding is to prevent multiplicity of actions and to prevent the matter from being tried twice with possibly different results. The initiation of a third party proceeding is akin to the issuance of a writ of summons and a proceeding begun by it is as if it were an action. In this regard, a defendant who issues a third party notice is as if he is a plaintiff.

[35] Learned counsel further submit that a third party notice creates a separate action, independent of the original action, so that if the original is settled or otherwise disposed of, the third party proceeding may continue. The third party proceeding must therefore be viewed as an independent proceeding between the defendant as plaintiff and the third party as defendant.

[36] It was further argued by the defendant's counsel that the independent action/cause of action as against the defendant had come to an end when the third party notice was ruled in favour of the defendant. As such the principle of res judicata should apply against the plaintiff. The present action against the defendant is premised on the relief as prayed for in para 15 of the statement of claim wherein at prayer (i) the plaintiff had prayed for 'An Order that the defendant to indemnify and to keep the plaintiff fully indemnified against the

full Judgment Sums and costs in Kuala Lumpur Suit No D-22NCVC-165-2011 ...'.

OUR DECISION

[37] On the issue as to whether the merits of the case had been argued by the plaintiff and the defendant during the hearing of the third party notice, it is pertinent to observe that one of the issues argued by the plaintiff and defendant is the issue of indemnity against the defendant by the plaintiff in reliance of cl 19.1 of the branch partnership agreement.

[38] In the third party claim against the defendant as stated in para 9, the following prayers were sought by the plaintiff and is reproduced herewith namely:

> 9. Dan Defendan (Lee Choon Hei) (respondent in the present appeal) yang menuntut terhadap Pihak Ketiga:-
>
> 9.1. Suatu perisytiharan bahawa dia berhak mendapat indemniti seperti disebut terdahulu;
>
> 9.2. Indemniti bagi apa-apa penghakiman bagi apa-apa amaun yang boleh didapati kena dibayar olehnya kepada Plaintiff (the Bank);
>
> 9.3. Penghakiman bagi apa-apa jumlah kos yang boleh diputuskan untuk membayar kepada Plaintif dan untuk jumlah kos sendiri mempertahankan tindakan dan prosiding pihak ketiga.
>
> 9.4. Selanjutnya atau sebagai pilihan ganti rugi kerana melanggar kontrak.
>
> 9.5 Faedah ke atas jumlah penghakiman dan kos diperolehi oleh Plaintif pada 30.11.2012 dari tarikh itu dan pada apa-apa kadar yang adil menurut Kaedah-Kaedah Mahkamah 2012; dan
>
> 9.6. Selanjutnya lain-lain relief yang Mahkamah yang mulia ini dianggap wajar dan adil.

[39] In opposing the plaintiff's third party notice the defendant had filed three affidavits in reply, namely affidavit in reply affirmed on 10 February 2015, affidavit in reply affirmed on 6 March 2015 and affidavit in reply affirmed on 27 March 2015 respectively.

[40] At para 9 in the affidavit in reply affirmed on 10 February 2015, the defendant avers as follows:

(a) 14 July 2006, the branch partnership agreement dated 14 July 2006 was executed by him (defendant) as a partner of the firm at the material times;

(b) subsequent thereof on 1 August 2006, I retired as a partner from the firm. A copy of the letter to the Bar Council dated 26 June 2006 is produced hereto and shown to me marked as exh 'CBH5'; and

(c) the alleged fraudulent conduct by one of the partners of the firm took place on or around 12 October 2006, ie after I had retired from firm. A copy of the Bar Council Malaysia's letter dated 10 March 2014 in relation to the 'Status of Messrs Paul Cheah & Associates' can be seen as exh B, LCH 'Affidavit and Enclosure 82'.

[41] The learned JC held that the defendant was indeed a partner of the firm notwithstanding his letter to the Bar Council on 26 June 2006 notifying his retirement as senior partner and his re-designation of his role as consultant to the firm. In every aspect, the defendant's position as the principal owner had not changed. Accordingly, the defendant is liable to indemnify the plaintiff.

[42] It is our observation that although the learned JC made a finding that the defendant was the principal owner of the firm and is liable to indemnify the plaintiff, however the order of the learned JC was to terminate the third party proceeding filed in Suit 165 after perusing the affidavits, written submissions and hearing the oral submission on the ground of procedural irregularities.

[43] We further hold the view that the learned JC had heard arguments on the issue of indemnity against the defendant on its merits and ruled that the defendant is liable to indemnify the plaintiff. The prayers in the third party proceeding and in Suit 285 are similar ie that the defendant be liable to indemnify the plaintiff for the Suit 165 judgment.

Is the doctrine res judicata applicable?

[44] In order for the doctrine of res judicata to apply, the plaintiff have to prove that the same issue must have been raised and decided in an earlier proceeding/action in which the parties are represented.

[45] The earlier judgment must necessarily and with precision determine the point in issue.

[46] What is meant by res judicata has been well explained in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where Peh Swee Chin FCJ in delivering the judgment of the court stated:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem* judicature. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the

> judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

See also the case of *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1993] 4 CLJ 332.

[47] Thus, for the doctrine of res judicata to apply, the same issue must have been raised and decided in an earlier proceeding or action in which the parties are represented. And for that reason, it is not open for the same issue to be litigated afresh between the same parties. This doctrine is based on the public policy that there must be finality and conclusiveness in judicial decisions and the right of the individual from being vexed by multiplicity of suits at the instance of an opponent. In *Satyadhyan Ghosal and others v SM Deorajin Debi and another* 1960 AIR 941, the Indian Supreme Court stated the principle as follows:

> (7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

[48] Reverting to the case at hand, we are constrained to disagree with the decision of the learned JC that the merit of the case was never argued. It is patently clear that in the ground of judgment the learned JC touched on the issue of indemnity and found that the defendant was liable to indemnify the plaintiff. These were the very same issues raised in the third party proceeding that was earlier dismissed. Hence the doctrine of res judicata is applicable.

CONCLUSION

[49] Based on the reasons as adumbrated above and in all the circumstances, it is our unanimous decision that there is merit in the appeal which required an appellate intervention. We hereby allow the appeal with costs of RM25,000 subject to the payment of allocator fee. The order of the High Court dated 27 December 2019 is set aside and substituted with an order that the plaintiff's claim against the defendant is dismissed.

Appeal allowed with costs.

Reported by Muhamad Azham Marwan